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Hearing Date: November 28, 2018

*Attorneys for Claimant  
FGLS Equity LLC*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

**FGLS EQUITY LLC'S SUR-REPLY IN OPPOSITION TO  
TRUSTEE'S TWENTY-THIRD OMNIBUS MOTION  
TO OVERRULE OBJECTIONS OF CLAIMANTS WHO  
INVESTED MORE THAN THEY WITHDREW**

Claimant FGLS Equity LLC ("FGLS") submits this sur-reply in further  
opposition to the motion of Irving H. Picard, trustee ("Trustee") to the extent  
that it requests that this Court overrule FGLS's objections based on

Bankruptcy Rule 3007 to the Trustee's determination of the customer claim filed by FGLS (Claim No. 011505), ECF No. 18040 (the "Motion").<sup>1</sup>

FGLS's Objection to the Trustee's Motion (ECF No. 18155) demonstrated (i) that the Motion had not addressed FGLS's Rule 3007 objection and (ii) that the Trustee's determination letter the letter failed to satisfy Rule 3007 by failing to explain his basis for assigning a zero value with respect to the \$3,149,075 transfer into FGLS from a different BLMIS account, C&P Associates. The Trustee's Reply (ECF No. 18218) concedes that "[a] claim for customer protection under SIPA is the 'functional equivalent of a proof of claim in a bankruptcy case,'" Reply at 9 (*quoting Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 437, 443 (S.D.N.Y. 2014)), does not dispute that Rule 3007 requires a trustee to specify the methodological and factual basis for denying a claim, and does not deny that the determination letter failed to set forth any basis for assigning a zero value.

The Trustee's Reply first invokes the Claims Procedure Order (ECF No. 12) to argue that his "determination of a customer claim is not the same as an objection to a claim and therefore Bankruptcy Rule 3007 does not apply." Reply at 10. While the two may not be "the same," this court has

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<sup>1</sup> As stated in the letter to the Court from counsel for FGLS seeking leave to file this sur-reply, the Trustee did not mention FGLS's objection under Bankruptcy Rule 3007 in its moving papers, ECF No. 18040 and presented his basis for seeking to overrule FGLS's Rule 3007 objection for the first time in his reply papers, ECF No. 18218. This sur-reply accordingly represents FGLS's first opportunity to respond to the Trustee's position with respect to the Rule 3007 objection.

ruled that a claimant such as FGLS “can argue the same points, allege the same facts, and obtain the same result by following these procedures” as they would have been able to if the order had not been in effect. *Peskin v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 413 B.R. 137, 144 (Bankr. S.D.N.Y.2009), *aff’d*, 440 B.R. 579 (S.D.N.Y. 2010). Thus the Trustee’s reliance on the Claims Procedure Order for ignoring Rule 3007’s requirements of specific supporting allegations is misplaced.

Second, the Trustee makes what is essentially a burden argument, contending that the SIPA statute supersedes Rule 3007, apparently because requiring the Trustee to share with FGLS his rationale for adjusting the value of a transaction from \$3,149,075 to zero would “impede the Trustee’s duty to determine and satisfy customer claims promptly after his appointment.” Reply at 10-11. This conclusory argument is unsupported in the record and implausible on its face. Identifying the methodology employed, providing the balance of the transferor account and stating the extent to which that balance reflected net equity rather than fictitious profits could have been done in one or two sentence and would not have required any work beyond what the Trustee had already necessarily performed to arrive at his determination. Documents submitted by the Trustee with his Reply in fact confirms that, prior to issuing the determination letter, the Trustee had already written out its analysis of the C&P account and its relationship to the initial transfer to FGLS in short passages contained in complaints filed

against C&P and FGLS respectively, and it is simply not credible that complying with Rule 3007 by providing the same information in the determination letter would have been burdensome, let alone compliance would have imposed sufficient burden to “impede” “prompt” disposition of customer claims.<sup>2</sup>

## CONCLUSION

For the reasons stated above and in FGLS's initial objection, the Court should deny the Trustee's Motion to the extent that it seeks to overrule FGLS's objections based on its argument that the determination letter is facially insufficient for lack of specificity and factual allegations, and rule that FGLS is entitled to an additional credit in its approved customer claim in the amount of \$3,149,075.

Dated: New York, New York  
November 27, 2018

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By: \_\_\_\_\_s/\_\_\_\_\_  
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2 Although the Trustee relies on these pleadings as information available to  
FGLS outside of the claims determination process, it notably does not contend that  
pleadings filed in an action that had been voluntarily dismissed (the FGLS  
complaint) or filed in an action against a separate BLMIS customer (the C&P  
complaint) should somehow be deemed incorporated in the Trustee's determination  
letter for purposes of assessing whether the determination letter complied with the  
specificity requirements of Rule 3007.

CERTIFICATE OF SERVICE

I, Richard C. Yeskoo, an attorney admitted to practice in the State of New York and a member of the firm of Yeskoo Hogan & Tamlyn, LLP, counsel for claimant FGLS Equity LLC ("FGLS"), hereby certify that on November 27, 2018, true and correct copies of FGLS Equity LLC's Sur-Reply in Support of its Partial Objection With Respect To Its Claim No. 011505 To Trustee's Twenty-Third Omnibus Motion To Overrule Objections Of Claimants Who Invested More Than They Withdrew was served via electronic mail upon:

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and by ECF on the remaining parties to this adversary proceeding.

Dated: New York, New York  
November 27, 2018

s/ Richard C. Yeskoo

